B.R.T.A.Kan./43

~~1943.~~

Examined

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File No.

Legal DEPARTMENT

A BRANCH

Subject:—

Appeals to the Bombay Revenue Tribunal from Kanara District.

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BOMBAY REVENUE TRIBUNAL.

WRITTEN STATEMENT.

1. S.Ns. 91B and 112B of Shedgeri were Government forest lands which were disforested in 1921; (file I, page 51). At the time the lands were disposed of, a natural water channel ran through the said lands, and an area of 2 gunthas was deducted as pot-kharab in respect of the water channel in each of the said lands : File I, pp.23 and 79 and p.85 of the appeal papers.

2. The appellant seems to have purchased the lands in January 1925, file I, p.53. He seems to have recently filled up the water channel abovesaid and brought the land under cultivation. This has given rise to complaint on the part of occupants of neighbouring lands, who allege that his action has deprived them of the water which flew down the channel and to which they are entitled. The appellart, on the other hand, requested permission to bring the land under cultivation. The Assistant Collector on 3.1.1940 and again on 29.4.1941 directed the appellant to remove the encroachment on the pot-kharab. The Deputy Collector having purported to reconsider these orders, the Collector on appeal has confirmed them by his order dated 16th September 1941, now under appeal.

3. It is submitted that the order of the Collector is lawful and proper.

4. The appellant's first contention is that there was no natural water channel at all in the land. He relies on (i) extracts from the survey papers of 1872, and (2) the order of Mr.Bristow, then Collector of Kanara, dated 16th December 1933. But these documents do not support the contention. It is true that the survey records of 1872 deduct pot-kharab in respect only of stony land, and none in respect of a water channel; but if the survey was made in the fair season, long after the end of the monsoon, it is possible that the water channel may have dried up and was not noticed by the surveyors. And in any event the survey records can only evidence the circumstances which existed in 1872, and cannot be looked at

in determining the circumstances existing in 1922 and subsequent years. On this point, the deduction made by the classer in 1923 as stated above is conclusive.

5. There is nothing in Mr.Tristow's order which expressly or by necessary implication negatives the existence of such water-channel. The order was made to settle the dispute as regards certain rights which the appellant claimed over the neighbouring land of S.N.112A which was granted to one Mr.Lima. The order was passed after personal inspection of the site. It states: "There is a natural channel running through S.N.113 which sends water through S.N.90 and also down a channel from X and Y to S.N.s91 and 92." Here and elsewhere in the order, the channel at X and Y (shown in the sketch at p.175 of File II) is referred to because that was the part of the channel which fell within S.N.112A in respect whereof a decision was called for. This does not imply that the channel terminated at Y. On the contrary it is mentioned that the channel carried water to S.Ns. 91A and 91B and this necessarily implies that the channel continued from point Y.through S.N.591B and 112B. The order of the Collector dated 16th December 1933 therefore negatives rather than supports the appellant's contention.

6. The appellant next contends that the water case falls under the proviso to rule 75(1)of the Bombay Land Revenue Rules, 1921. In order to entitle him to the benefit of the provision, he must establish that the natural channel was used only for the irrigation and watered only land which is in his occupation. But there is nothing to prove this. The occupants of land further down the channel claim that they have a right to the water flowing down this channel. And the claim is not improbable inasmuch as the channel continues further down through those lands, and but for the obstruction to the channel on the part of the appellant, the water would flow down the channel to the neighbouring lands through which the channel passes (see Sketches at pp.251,253 and 261 of File I).

7. It is submitted that rule 75(1) is consistent with and must be interpreted in the light of the

common law of the country. Under that law, every owner or occupant of land has the right, recognised by illustration (h) to the Indian Easements Act, 1882, that the water of every natural stream which passes by, through, or over his land in a defined channel shall be allowed by other persons to flow within such limits ~~within~~ without interruption and without material alteration in quantity, direction, force or temperature. (As to riparian rights, please see Subbaraya Mudr Vs Secy of State 55 Mad 288) The occupant of every holding lower down the channel would have such a right as against the appellant if the channel be a natural stream ~~in~~ which flows through the appellant's land. The channel is stated to be a natural channel, and appears to have been a defined channel It appears to flow mainly during the rainy season, but ~~as the Privy Council has held that a river which carries water only during the rainy season is none the less a river, there is no reason why the channel in this case should not be deemed to be~~ it is nevertheless a natural stream in respect whereof the lower riparian owners have the right as abovesaid. (see Hollmeyer Vs Trinidad Lake Petroleum Co. (1918) A.C. 485 P.C.

8. The circumstance that water rate has not been levied on any of these lands under section 55 of the Bombay Land Revenue Code, 1879 would not be conclusive on the question whether the occupant of those lands has the right to the water. The appellant's own land is not assessed to the water rate but it is beyond question that he has been given the right to the water flowing past his land in the channel.

9. It is therefore submitted that the evidence does not show that the appellant was entitled to the use of the channel, and the water flowing into it. His right appears prima facie to be of the kind referred to in illustration (j) to section 7 of the Easements Act. And unless he first obtains a decree of the Civil Court establishing his exclusive right to the water of the natural channel, his request for Government's sanction to file up the stream and bring the land into cultivation cannot properly be granted.

10. For all these reasons, it is submitted that the appeal be dismissed.